and by now the position may well have crystallised.

Whether or not a winding-up order is made is a discretionary matter. Admittedly the defendant does appear to have some financial problems but this alone is not conclusive. The other major creditor of the respondent is opposed to the winding-up and there is no evidence before me that the defendant is unable to pay the debt of the plaintiff.

The passage in *Buckley* appear to indicate that the old practice was for petitions founded on a disputed debt to be ordered to stand over until the debt was established by action. The modern practice has been to dismiss such petition unless of course the debt is not disputed on some substantial grounds in which case the court could decide on the petition and make the order.

The facts in this case indicate to my mind that there is a substantial dispute here which should have been apparent to the petitioner at the very least when they received the respondent's affidavit dated June 16, 1984.

The continuation of the winding-up proceedings after they had that knowledge, was not a permissible exercise of the process of this court.

Accordingly I would dismiss this petition.

As to costs I order that the respondent may tax their costs but shall not be entitled to enforce payment therefor until the final disposal of the action which the parties may initiate against each other arising out of the debt which was a subject matter of these winding-up proceedings.

Before concluding this judgment there is one other matter that must be mentioned. After hearing arguments from counsel on both sides on September 22, 1984, I intimated that the matter would be adjourned till October 2, 1984 when I would make known my decision in this matter and the reasons therefor. On October 1, 1984 the petitioner's solicitors filed a further affidavit seeking to urge upon me further grounds why it should be held that the respondent is unable to pay his debts. It is trite law that equity aids the diligent. The proper time for parties to file affidavits is before the hearing and not as in this case, after the matter has been adjourned for judgment. Exceptionally, there may be situations where new material has come to light after a trial and before judgment which is highly material to the issue and which no reasonable diligence could have discovered. But this is not such an affidavit. I would accordingly express my disapproval of what has been done here and I would add that I have not taken into consideration any of the matters urged in this latest affidavit in arriving at my decision. Nor do I see the need to do so. The petitioners can safely be left to urge this evidence elsewhere.

*Order accordingly.*

Solicitors: *Ong Ban Chai & Co.; Lim Cheng Poh & Lim.*

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## MOKHTAR HAJI JAMALUDIN v. PUSTAKA SISTEM PELAJARAN

**[O.C.J. (Gunn Chit Tuan J.) January 22 & 23 & March 13, 1985]**

**[Kuala Lumpur – Civil Suit No. C775 of 1980]**

*Copyright – Infringement of – Damages – Award for injury to feelings or pride – Contracts Act, 1950, s.74 – Copyright Act, 1960, s.14(3).*

*Contract – Breach of oral agreement – Contracts Act, 1950, s.74.*

*Damages – Copyright infringement – Award for injury to feelings or pride.*

The plaintiff was a writer of two literary works entitled "Jalan Yang Berlubang" and "Ukuran Hati Mulia" (hereinafter referred to as the said literary works). The plaintiff sent thirty manuscripts amongst which was the said literary works to the defendants who were a firm of book publishers. There was an oral agreement with the defendants' editor called Encik Alias sometime in 1977 or early 1978 whereby in consideration of advance royalties of $300 and an annual payment of royalty of 10% of the retail sale price of each copy of the said literary works sold, the defendants were given a licence to publish and sell by way of trade to the public the said literary works. There was to have been a written agreement but no such written agreement was made as the plaintiff was told by the defendants that "it would be signed later." However, in early 1980 the plaintiff discovered that the words "oleh Mokhtar A.K." were printed on the cover of the said literary works. As Mokhtar A.K. is another writer, the plaintiff complained that the intention of the defendants was to convey the idea that the said literary works were written by Mokhtar A.K.

On the reverse side of the title page each of the said literary works, the name of the defendants was printed immediately after a letter "C" within a circle which indi-

cates that the ownership of the copyright belongs to the person whose name follows it.

The plaintiff brought an action against the defendants for copyright infringement. The only issue before the court was the award of damages.

**Held**: (1) compensation cannot be given for any remote and indirect loss or damage sustained by reason of the breach of the agreement. But the plaintiff was entitled to damages for infringement of his copyright in the said literary works;

(2) in an action for infringement of copyright damages have been said to be at large *i.e.* not limited to the pecuniary loss that can be specifically proved. Where the plaintiff's proper feelings of dignity and pride have been injured aggravated damages may be awarded;

(3) taking a conservative and less liberal view, the plaintiff would be entitled to damages in the sum of $2,500.

*Cases referred to:*

(1) *Jarvis* v. *Swans Tours Ltd.* [1973] Q.B. 233, 237.
(2) *Syed Alwi* v. *Dewan Bahasa & Pustaka* [1980] 1 M.L.J. 129.
(3) *Fenning Film Service* v. *Wolverhampton Cinemas* [1914] 3 K.B. 1171, 1174.
(4) *Exchange Telegraph Co.* v. *Gregory* [1896] 1 Q.B. 147, 153.
(5) *Rookes* v. *Barnard* [1964] A.C. 1129, 1225.

CIVIL SUIT.

*D.P. Naban* for the plaintiff.

*C.T. Lee* for the defendants.

*Cur. Adv. Vult.*

**Gunn Chit Tuan J.**: Damages were the only issue left in this copyright infringement action by one Mokhtar Haji Jamaludin (the plaintiff), a writer of literary works writing under his own name and also under the pseudonym "Mokjamos." He had obtained the consent of Pustaka Sistem Pelajaran (the defendants), a firm of book publisher, for, *inter alia*, a declaration that he is the sole author and owner of the copyright in two literary works entitled "Jalan Yang Berlubang" and "Ukuran Hati Mulia" (hereinafter referred to as "the said literary works") and an injunction to restrain the defendants whether by their partners, servants or agents from selling or continuing to sell by way of trade any copies of the said literary works until the defendants amend at their own expense all available copies of the said literary works.

According to the plaintiff (P.W.1) the said literary works were amongst thirty manuscripts which he had sent to the defendants. There was an oral agreement with the defendants' editor called Encik Alias sometime in late 1977 or early 1978 whereby in consideration of advance royalties of $300/- and an annual payment of royalty of 10 per cent of the retail sale price of each copy of the said literary works sold, the defendants were given a licence to publish and sell by way of trade to the public the said literary works. There was to have been a written agreement, but no such written agreement was made as the plaintiff was told by the defendants that "it would be signed later." However, in early 1980 the plaintiff discovered that the words "oleh Mokhtar A.K." were printed on the cover of the said literary works. But his pen-name was printed on the first sheet of the title page of the said literary works. As Mokhtar A.K. is also a writer the plaintiff complained that the intention of the defendants was to convey the idea that the said literary works were written by "Mokhtar A.K.." Although he did not know when the said literary works were published the plaintiff made a complaint to the defendants who then told him that the manuscripts were not his. The plaintiff also told the Court under cross-examination that although he agreed that there might be a mistake yet he felt upset and worried if the name of Mokhtar A.K. is used on his books. He also said that, unlike his other books, on the reverse side of the title page of each of the said literary works the name of the defendants was printed immediately after a letter 'C' within a circle which indicates that the ownership of the copyright belongs to the person whose name follows it.

Heng Soong Kong alias Michael Ong (D.W.1), the managing partner of the defendants, stated that their Encik Alias might have arranged to give the plaintiff royalties, but as far as he was concerned he was under the impression that once a sum of money had been paid the copyright would be assigned to them as in the case of all other writers. He said that the name "Mokhtar A.K." on the cover of the said literary works was a mistake made by their freelance artist. He did not realise the mistake until he received a letter from the plaintiff's solicitors in 1979 (Exhibit D.4). There was no complaint prior to the receipt of D.4. Under cross-examination he agreed that the cover of the said literary works shows that Mokhtar A.K. had written them. He admitted that after discovering the mistake he did not take any steps to remedy it, and then also agreed that he had not entered into any agreement to purchase the copyright of the plaintiff and that it was wrong to put the words "Pustaka Sistem Pelajaran" after the symbol (C) in

the said literary works as they have no claim to the copyright.

Mr. C.T. Lee, counsel for the defendants, in a brief submission stated that there was no intention to cause a breach of the agreement, but assuming that there was a breach of the agreement the plaintiff had not discharged the onus of adducing evidence to prove that he had suffered damage. He then referred to section 74 of the Contracts Act, 1950, on compensation for loss or damage caused by breach of contract and submitted that as the principle of *restitutio in integrum* applied, the plaintiff's claim for damages should be dismissed.

Mr. Naban, counsel for the plaintiff, pointed out that the feelings of the plaintiff had been hurt although there was no direct financial damage. He submitted that when wounded feeling was involved the principle of *restitutio in integrum* no longer applied and contended that the plaintiff was entitled to exemplary damages after referring to the following paragraph at page 223 in Vol. 11 of *Halsbury*'s Laws of England (3rd. Edition):–

"Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant may be taken into consideration, the principle of restitutio in integrum no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer."

Then after referring to the following passage in the judgment of Lord Denning M.R. in *Jarvis* v. *Swans Tours Ltd.*[1]:–

"What is the right way of assessing damages? It has often been said that on a breach of contract damages cannot be given for mental distress. Thus in *Hamlin* v. *Great Northern Railway Co.* (1856) 1 H. & N. 408, 411 Pollock C.B. said that damages cannot be given "for the disappointment of mind occasioned by the breach of contract." And in *Hobbs* v. *London & South Western Railway Co.* (1875) L.R. 10 Q.B. 111, 122, Mellor J. said that

> 'for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages.'

The courts in those days only allowed the plaintiff to recover damages if he suffered physical inconvenience, such as having to walk five miles home, as in *Hobbs'* case; or to live in an over-crowded house. *Bailey* v. *Bullock* [1950] 2 All E.R. 1167.

I think that those limitations are out of date. In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities."

counsel referred to *Syed Alwi* v. *Dewan Bahasa & Pustaka*[2] which is a local case involving the infringement of copyright and in which Vohrah J. ordered, *inter alia*, the defendants to pay damages to the plaintiff in the sum of $10,000/-. Counsel then suggested that the defendants ought to pay the plaintiff damages in the sum of $5,000/-.

In this case the plaintiff was entitled to damages for breach of the agreement, albeit an oral one, as well as infringement by the defendants of his copyright in the said literary works (*Fenning Film Service* v. *Wolverhampton Cinemas.*[3]). Thus section 14(3) of the Copyright Act, 1969, gives an owner of a copyright a remedy for the infringement of his copyright, which has these days come to be known as one of the economic torts (see *McGregor* on Damages (14th. Edition) at page 963), and is as follows:–

"Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright; and in any actions for such an infringement all such relief, by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights."

For the assessment of damages caused by the breach of the agreement I agreed with counsel for the defendants that compensation cannot be given for any remote and indirect loss or damage sustained by reason of the breach of the agreement. But here the plaintiff was also entitled to damages for infringement of his copyright in the said literary works, and in an action for infringement of copyright the damages have been said to be at large, *i.e.* not limited to the pecuniary loss that can be specifically proved, and the courts have consistently endorsed Lord Esher M.R.'s pronouncement in *Exchange Telegraph Co.* v. *Gregory*[4] that "it is not necessary to give proof of special damage" because "the damages are damages at large." And in cases where the damages are at large a jury in England (or the judge if the award is left to him) can take into account the motives and conduct of the defendants where they aggravate the injury done to the plaintiff, and where the plaintiff's

proper feelings of dignity and pride have been injured aggravated damages may be awarded (*Rookes* v. *Barnard*[5]).

In our present case when counsel for the plaintiff suggested that damages should be assessed at $5,000/- I think that he realised that the plaintiff, with respect, was not in the same class of writers as the Syed Alwi who had sued Dewan Bahasa & Pustaka. But as damages are at large and in the words of Horridge J. in *Fenning Film Service* v. *Wolverhampton Cinemas* "therefore I can give what amount I think right as if I was a jury ... to cover both the breach of contract and the tort". In all the circumstances of this case, I considered that I should be conservative and less liberal in my assessment of damages and therefore awarded the plaintiff damages in the sum of $2,500/- only.

*Order accordingly.*

Solicitors: *Skrine & Co.; Syarikat Lek Yan.*

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## WAZURAIYAH BTE. MOHAMED v. MEGAT NAJMUDDIN & ORS.

**[O.C.J. (Abdul Malek J.) February 17, April 1 & 9, 1985]**

**[Kota Bharu – Originating Motion No. 16 of 1984]**

*Land Law – Private caveat – Application for removal – Joint venture agreement – Caveatable interest – Protection.*

The applicant appealed against the dismissal of her application to remove a private caveat entered by the respondents over a piece of land in the Mukim of Tanjong Chat, State of Kelantan. One Tengku Zaid ("TZ"), the registered owner of the land agreed to sell it to Zaid Holdings on certain terms and conditions. There was a joint venture agreement between Gunong Petaling ("GP") and TZ with regard to the land, in respect of which TZ executed a transfer in Form 14A in favour of the applicant on May 7, 1983. TZ later died on May 11, 1983. The respondents entered the caveat on June 29, 1983. The applicant applied for the removal of the caveat.

**Held**, dismissing the application : (1) it is abundantly clear that the applicant's grounds must fail in view of the fact that the respondents had a caveatable interest in the land under the joint venture agreement;

(2) the rights of the respondents to the land ought to be protected by the caveat and accordingly the application to remove it should be dismissed with costs.

[*Editorial Note:* Notice of Appeal was filed on April 11, 1985.]

*Cases referred to :*

(1) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212.

(2) *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.* [1976] 2 M.L.J. 44.

[The following cases were also cited: *Foo Say Lee* v. *Ooi Heng Wai* [1969] 1 M.L.J. 47; *Hussanjan* v. *Haji Nik Yahya bin Nik Daud & Ors.* [1973] 1 M.L.J. 9; *Haji Hamid bin Ariffin & Ors.* v. *Ahmad bin Mahmud* [1976] 2 M.L.J. 79; *Teo Ai Choo* v. *Leong Sze Hian* [1982] 2 M.L.J. 12.]

ORIGINATING MOTION.

*Manjit Singh* for the applicant.

*Wong Swee Min* for the respondents.

*Cur. Adv. Vult.*

**Abdul Malek J.** : The applicant is appealing against the dismissal of her application to remove Private Caveat Presentation No. 206 of 1983 Jilid 1 Folio 36 (hereinafter "the caveat") which was registered on June 29, 1983 and entered by the respondents over the whole of the land held under Geran No. 10588 for lot No. 763 in the Mukim of Tanjong Chat in the State of Kelantan (hereinafter "the said land").

The basis of her application can be summarised in chronological order:

(a) on March 17, 1983 Zaid Holdings (hereinafter "ZH") passed a Directors' resolution approving the purchase of the said land for $165,000/- and substituting itself for Tengku Zaid bin Tengku Ahmad (hereinafter "TZ") in the joint venture agreement between Gunung Petaling (hereinafter "GP") and TZ with regard to the said land (exhibit WM-1A);

(b) on March 18, 1983 the registered proprietor of the said land TZ agreed to sell the said land to ZH for $165,000/- subject to terms and conditions mentioned in a letter of the same date (exhibit WM-1);

(c) on March 23, 1983 ZH resolved that TZ give a power of attorney to one Rosnani Abdul Hamid as regards all matters pertaining to the said land (exhibits WM-4 and WM-5B);

(d) on March 28, 1983 TZ issued the acknowledgment and receipt for the payment of $165,000/-